86-2014

No.

Supreme Court, U.S.
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CLERK

In the Supreme Court

OF THE

United States

October Term, 1986

Robert Bowie Johnson, Jr.
Petitioner

V.

Kalman R. Hettleman, *et. al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert Bowie Johnson, Jr.
Plaintiff/Petitioner, *pro se*
727 Montalban Drive
Annapolis, Maryland 21401
(301) 757-4630
(301) 974-0882

QUESTIONS PRESENTED

1. To what extent can state and local governments legally interfere with the marketing of Constitutionally protected speech through the framework of an association of government agencies, and through combinations with special-interest economic boycott groups?

2. Because of the wide-ranging implications, should not the Supreme Court be the one to decide whether the provisions of state shield laws can be Constitutionally applied to writers and editors of government and quasi-government publications?

3. Does not the ruling of the Fourth Circuit Court of Appeals in this case conflict with two very recent Supreme Court rulings on the subject of summary judgment?

4. Should the Supreme Court review or reemphasize its instructions to the lower courts regarding their treatment of pro se litigants?

PARTIES TO THE PROCEEDING

Plaintiff: Robert Bowie Johnson, Jr.

Defendants: Kalman R. Hettleman, Luther Starnes, The American Public Welfare Association (APWA), The National Organization for Women (NOW), Emmett Burns, Carl Snowden.

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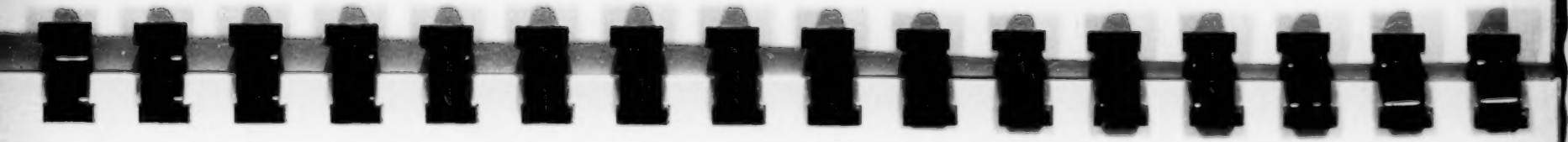

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UNITED STATES CONSTITUTION

First Amendment 2

Fourteenth Amendment 2

No.

IN THE SUPREME COURT

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October Term 1986

Robert Bowie Johnson, Jr.
Petitioner

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Kalman R. Hettleman, et. al.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Robert Bowie Johnson, Jr., the Plaintiff pro se in the proceeding below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is attached as Appendix A. A request for rehearing was denied (Appendix B). Excerpts

from the dispository hearing of the District Court are attached as Appendix C. The District Court's order is attached as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1987. A petition for rehearing was denied on March 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment and the first section of the Fourteenth Amendment which provide as follows:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV

Section I All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

In late September of 1980, Plaintiff, Robert Bowie Johnson, Jr., a writer, and Ronald Pramschufer, a graphic designer, published a social and political satire in the form of a copyrighted board game entitled Public Assistance - Why Bother Working for a Living? The case record revealed that in reaction to the immediate popularity of the game, the leadership of America's welfare establishment, centered in Defendant American Public Welfare Association (APWA), the formal association of America's 1250 state and local welfare agencies, met in private to discuss the game and the effects of its continued sale upon government social policy. The notes of Peter Slavin, the editor of Defendant APWA's monthly newsletter, Washington Report, disclosed

that APWA officials acknowledged that the game was "making a political statement" which if allowed free market expression "could be very harmful" and "reinforce moves to cut public assistance" and "create backlash toward social service programs as a whole and welfare in particular". The third and final page of Mr. Slavin's notes concluded thus: "Yes, good chance of organized opposition being successful ... Opponents need to contract (sic) stores directly, bring economic pressure".

The record further revealed that Defendant APWA subsequently mailed, as part of its December 1980 "Policy Edition" of Washington Report, the following letter to its 9,699 members, including virtually every local, state, and federal welfare agency in the United States:

> An Open Letter to All APWA Members from
> Executive Director Edward T. Weaver
>
> I am writing this letter to alert you to a new board game entitled, "Public Assistance - Why Bother Working for a Living?" This game is described in the accompanying article.
> I agree with Secretary Harris, the NAACP, and the National Organization for Women that

the game is callous, racist, sexist, and a "vicious brand of stereotyping." We, who are part of the reality of public welfare, understand the myths that surround the work we do and the people we serve. This game, however, plays out the basest forms of this mythology; we must not let it go unchallenged. I encourage you, as concerned APWA members, to take the following course of action:

1. Do an informal survey to see if the game is being sold in your area. If it is not, keep a watchful eye and initiate the actions in no. 2 below if it appears. You may be able to join with others to contact store owners/managers to discourage buying.

2. If the game is available in your area:

a. Don't buy it yourself. Let your friends know that it is <u>not</u> a "cute" holiday gift.

b. Spread the word to other interested groups (welfare rights advocates, civil rights groups, and women's groups).

c. Either alone or in combination with the groups identified in "b" contact the store owner, manager and/or buyer to explain why the game is offensive and should not be carried.

d. Keep us informed of your efforts.

As executive director of the American Public Welfare Association, I feel an obligation to you and to the mission we commonly serve to alert you to the "Public Assistance" game and to suggest the course of action I have outlined. If there are any questions that I, or APWA staff, can answer for you or information that we can share, please do not hesitate to contact us.

We at APWA headquarters will be doing what we can, in conjunction with our Washington colleagues, to remove the game from the marketplace.

At the time of the mailing of the above letter, Plaintiff had never heard of Defendant American Public Welfare Association (APWA) and knew nothing of its activities in regard to the game, or in any other regard. Plaintiff first discovered what he believed to be illegal government interference in the marketing of his game in February, 1981, when an official letter was uncovered from Stanley Brezenoff, the head of New York City's welfare agency, to thirteen chain and department store presidents. Plaintiff, Mr. Pramschufer, and their company, Hammerhead Enterprises, Inc., filed suit against Mr. Brezenoff, the city council, and the mayor of New York under the provisions of 42 U.S.C. 1983.

The District Court ruled against the Plaintiffs writing that the key to the dismissal lay in Plaintiffs' failure to prove that Mr. Brezenoff engaged in follow-up action. The District Court wrote: "The defendant's (Brezenoff's) testimony that his sole purpose was to respond, not to censor, is accepted as entirely credible. Once

he said what he had to say he took no further action to inhibit plaintiff's sales ... there was no threatened or actual follow up to the Brezenoff letter; the lack thereof defeats a claim of censorship." Hammerhead Enterprises, Inc. v. Brezenoff, S.D.N.Y. 1982 Slip Opinion, pp. 13 and 25). The Second Circuit Court of Appeals affirmed the District Court decision also emphasizing the significance of no proof of follow-up action. The Second Circuit wrote:

> Brezenoff took no further steps to trace the consequences of his correspondence. He did not investigate whether any merchants were in fact carrying the game nor did he contact any government agency which might have regulatory authority over New York department stores. ... In the absence of any evidence that Brezenoff or any other New York Official attempted to do more than express his view concerning the distasteful nature of appellants' invention, we decline to come to their assistance." Hammerhead Enterprises, Inc. v. Brezenoff, 707 F.2d 33 (2d Cir. 1983) aff'd 551 F. Supp. 1360, cert. denied, 464 US 892 (1983) pp. 1369 and 1364.

The Second Circuit further explained:

> We agree that, under certain circumstances, oral or written statements made by public officials will require courts to draw a fine line between permissible expressions of personal opinion and implied threats to employ coercive state power to stifle protected speech. Where

the comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request, a valid claim can be stated. Similarly, claimants who can demonstrate that the distribution of items containing protected speech has been deterred by official pronouncements might raise cognizable First Amendment issues. We have already noted, however, appellants cannot establish that this case involves either of these troubling situations." Hammerhead p.1373.

During the course of the Hammerhead case, Plaintiff discovered Defendant APWA's open letter and after the resolution of that case, Plaintiff discovered additional evidence of what he believed to be a broad, government-based illegal conspiracy to ban the game which involved the kind of "troubling situations" described by the Second Circuit decision cited above. In November of 1983, Plaintiff filed the case at bar under the provisions of 42 U.S.C. 1983, 1985 and 1986 for conspiracy to violate his right to print and market freely.

A hearing was held for the case at bar on July 11, 1986. The Court denied Plaintiff's motions to compel answers and documents. The

District Court further ruled that Defendant APWA was not a state actor (Appendix C, p.119), and that Defendant APWA was entitled to withhold the names from Peter Slavin's notes, and to withhold certain correspondence of his pertaining to the game on the basis that Mr. Slavin was a "newspaperman" and "reporter" (Appendix C pp. 64 and 118). Mr. Slavin at no time during the course of the proceedings claimed to be a newspaperman or reporter entitled to protect certain sources or documents. The District Court granted the motions of the Defendants for summary judgment. (Appendix D).

On September 3, 1986, Plaintiff submitted an informal appeal as directed by the Fourth Circuit Court of Appeals. On February 26, 1987, the Fourth Circuit affirmed the District Court decision in an unpublished opinion. (Append. A)

On March 24, 1987, Plaintiff's petition for a rehearing was denied. (Appendix B).

REASONS FOR GRANTING THE PETITION

The letter written by Defendant APWA to its 9,699 members, including 1250 state and local government agencies, reveals an intent to suppress political speech; that is, "to remove the game from the marketplace". And it unveils a plan to accomplish that end with the promise of coordinated follow-up. Can an association of 1250 state and local government agencies legally put such a plan into operation? First and Fourteenth Amendment case law forbids a single government agency from putting such a plan into operation. But now, in this case, the Fourth Circuit Court of Appeals has upheld the District Court's decision that the implementation of such a plan by an association of state and local government agencies is legal in that such joint activity under an associational umbrella somehow loses its color of state law and becomes private action. How and to what extent government agencies lose their character as state actors in association with each other

in an effort to suppress political speech, and become private parties protected by, instead of being in violation of, the First and Fourteenth Amendments, is an issue of such import as to be decided by the Supreme Court only.

2. The Fourth Circuit Court of Appeals upheld the District Court's ruling that the special-interest group boycotts of stores which carried the game were legal. The District Court cited NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 at the hearing (Appendix C p.46), but it did not come to grips with the question of how the involvement of government officials and agencies in those boycotts affect their legality. This is a new and pregnant issue which goes well beyond NAACP v. Claiborne, and should be resolved by the Supreme Court.

3. The Fourth Circuit Court of Appeals upheld the District Court's decision that an editor of a newsletter for an association of 1250 state and local government agencies is considered

a "reporter" and a "newspaperman" (Appendix C pp. 64 and 118), and that a second party (in this case Defendant APWA) is entitled to define who the newspaperman's sources are, and to withhold their names and other potentially incriminating documents from evidence. The District Court ruled that it is not necessary for the so-called newspaperman himself to assert a shield law privilege in order that a second party withhold the names of the newspaperman's sources and related documents from evidence. And the Court also ruled that the provisions of the respective state shield laws are not relevant to the Court's determination of who is a bonafide newsman, and who, additionally, is entitled to withhold the newsman's evidence. The District Court decided, "Well, I'm not worried about the Shield Law. It's (the APWA newsletter) some sort of a publication. That's all I'm .. I don't worry about the Shield Law. It was a publication, is that correct?" (Appendix C p.108).

This is a bold new interpretation of the

prerogatives of a Federal District Court, which prerogative negates several provisions of the Maryland Shield Law and also the Federal Rules of Evidence. Allowing a second party to withhold evidence based on an unclaimed privilege of the prime party is a grand departure from the accepted and usual course of judicial proceedings by a District Court. This departure has been sanctioned by the Fourth Circuit Court of Appeals and it calls for an exercise of the Supreme Court's power of supervision. Likewise, the very determination that an editor of a newsletter for an association of government agencies is afforded the protection reserved for the Fourth Estate is a grand departure also, blurring the distinction between press and government, calling for an exercise of the Supreme Court's power of supervision.

4. The Fourth Circuit's affirmation of the granting of summary judgment is in conflict with the criteria for such judgment recently published

in these Supreme Court cases: Jack Anderson v. Liberty Lobby and Celotex v. Catrett. Accord-to Celtotex, Defendant APWA, in order to prevail on a motion for summary judgment, must do one of two things: "First ... submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second ... demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." Celotex 54 LW 4779. Defendant APWA did not submit affirmative evidence that APWA is not a state actor, or demonstrate that Plaintiff's evidence of state action was insufficient. Instead, APWA relied on the spurious assertion that "APWA is not alleged in the complaint to be a state actor."

APWA's status as a state actor appears to be a genuine issue of fact requiring resolution by a jury. In Celotex, the Court wrote, "...A party (Defendant APWA in this case) who moves for summary judgment on the ground that the

nonmoving party has no evidence must affirmatively show that absence of evidence in the record .. the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party. If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion." 54 LW 4780.

The District Court acknowledged the perjury of Defendant Starnes of the Maryland Welfare Department (Appendix C p.68) and determined nonetheless that Starnes' testimony about his not engaging in the crucial issue of "follow-up action" was credible. And yet the Supreme Court in the Anderson case very emphatically upholds its decision in Adickes v. Kress 398 US at 158-59 as it says, "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts

are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." Anderson v. Liberty Lobby 54 LW 4759. Thus, the Fourth Circuit, in upholding the District Court's decision of summary judgment, has decided a federal question in a way which is in conflict with two very recent (June 1986), applicable decisions of the Supreme Court.

5. Plaintiff was penalized for conducting his case pro se. The District Court interrupted the Plaintiff one hundred and twelve times during the July 11, 1986 hearing, interfering with his right to properly present his case. The District Court also refused to accept two of Plaintiff's responsive pleadings which the clerk of the judge had told him to bring to the hearing for submission. (Appendix C p.25). The District Court also did not acknowledge that it had not docketed Plaintiff's motion to extend the discovery deadline, although this motion was refer-

enced in seven subsequent pleadings and in a letter to the District Court Judge. The above suggest a bias against pro se litigants which may run throughout the judicial system. The Supreme Court may find in this case a valuable opportunity to review or reemphasize its instructions to the lower courts in regard to the due process rights which must be afforded to litigants who proceed without counsel.

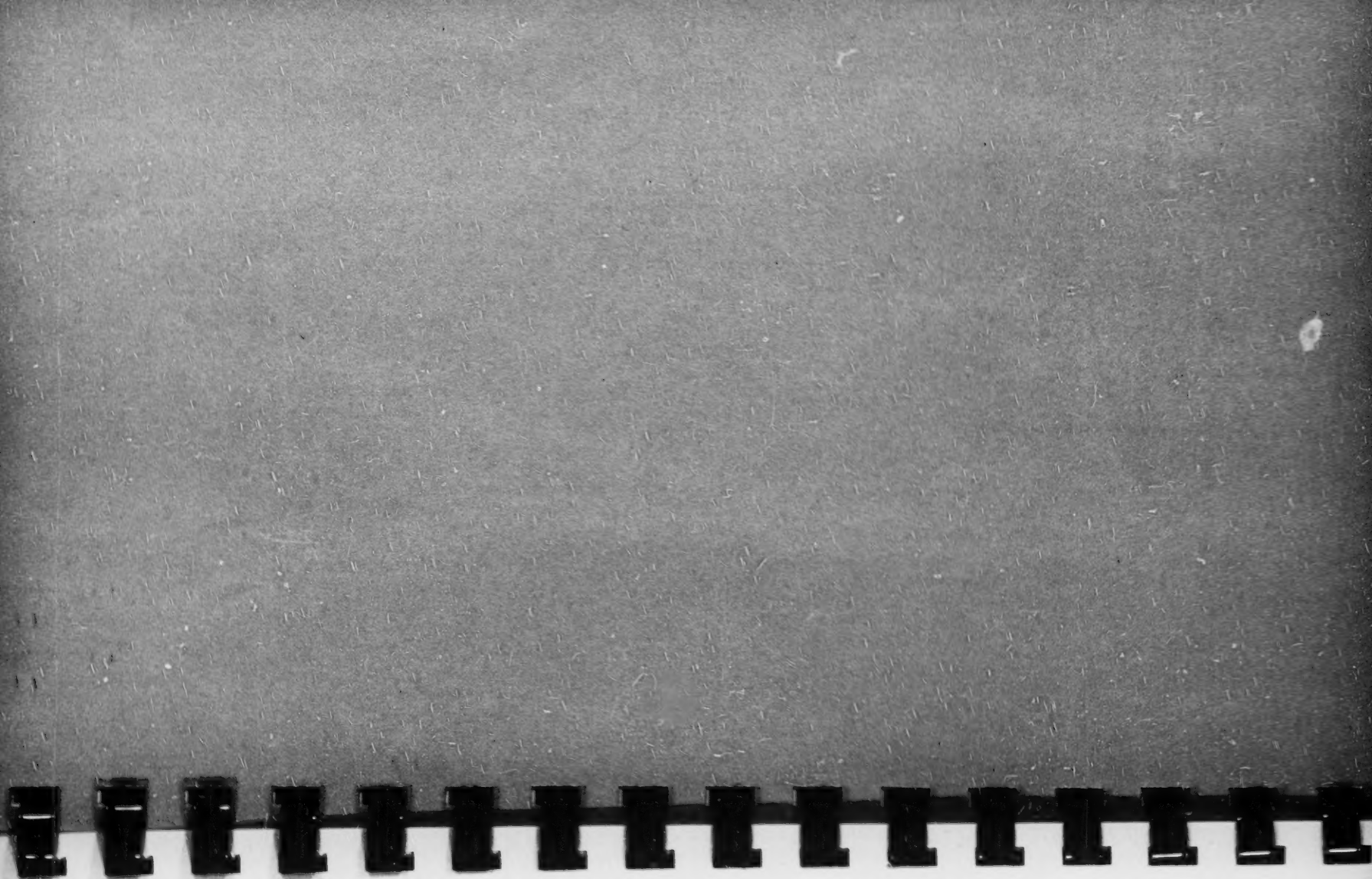
CONCLUSION

For all of the foregoing reasons the petition for Certiorari should be granted.

DATED June 22, 1987

Respectfully submitted,

Robert Bowie Johnson, Jr.
Petitioner and Plaintiff, pro se



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3104

Robert Bowie Johnson, Jr.,

Plaintiff - Appellant,

versus

Kalman R. Hettleman, University of Maryland, School of Social Work; Luther Starnes, Department of Employment and Training; Carl Snowden, The Annapolis and Anne Arundel Comunity Action Agency; Emmett Burns Dr., Region VII Director, The N.A.A.C.P.; National Organization for Women; The American Public Welfare Association,

Defendants - Appellees,

and

Chauncey Alexander; National Assocaition of Social Workers; Sylvia Gonzales; Edward T. Weaver,Executive Director, The American Public WelfareAssociation; Peter Slavin, Editor, WashingtonReport, The American Public Welfare Association,

Defendants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. John R. Hargrove, District Judge. (C/A No. 83-4097)

Submitted: January 29, 1987
Decided: February 26, 1987

Before HALL and MURNAGHAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

(Robert Bowie Johnson, Jr., Appellant Pro Se. Stephen Howard Sachs, Attorney General; Ralph S. Tyler, Assistant Attorney General; Nancy Backer Shuger, Office of the Attorney General of Maryland; Alan Hilliard Legum; Leonard Lewis McCants, McCants & Gerald; Thomas Jay Hart, Lena S. Zezulin, Thomas Hart & Associates; Emily Rody, Carolyn I. Polowy, Rody & Polowy; Harlan Lee Weiss, Sachs, Greenebaum & Taylor, for Appellees.)

PER CURIAM:

Robert Bowie Johnson, Jr., proceeding *pro se*, initiated this action on November 30, 1983, alleging that the defendants, under color of state law, conspired to ban or suppress the sale of his board game, "Public Assistance: Why Bother Working for a Living?", in violation of the First, Fifth, Sixth and Fourteenth Amendments, and 42 U.S.C. §§ 1983, 1985 (3) and 1986. The district court granted the defendant's motions to dismiss and for summary judgment on July 11, 1986, and this appeal followed.

We affirm the district court's decision. Johnson failed to allege facts that would state a claim under 42 U.S.C. § 1983. He could not prove that the defendants, under color of state law, engaged in conduct that deprived him of his First Amendment rights, see *Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33 (2d Cir. 1983), *aff'd* 551 F.Supp. 1360 (S.D.N.Y. 1982), *cert. denied*, 464 U.S. 892 (1983). Nor could he prove that the defendants deprived him of a protected liberty interest or property interest under the Fifth and Fourteenth Amendments, see *Board of Regents v. Roth*, 408 U.S. 564 (1972). And the Sixth Amendment has no application to Johnson's allegations.

Johnson also failed to allege facts that would state a claim under 42 U.S.C. § 1985 (3). He alleged no racial or class-based invidious discrimination. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). Section 1985 (3) does not encompass conspiracies motivated by economic, political or commercial animus. *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825 (1983).

A§ 1986 claim depends entirely upon a valid § 1985 claim. *Hahn v. Sargent*, 523 F. 2d 461, 470 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). Becasuse no valid § 1985 claim has been made, Johnson's assertion of a § 1986 claim is equally without merit.

We reject Johnson's claim that the district court denied him adequate time for discovery. Discovery rulings are within the district court's discretion, see *Rabb v. Amatex Corp.*, 769 F.2d 996, 999 (4th Cir. 1985), and that discretion was not abused. Johnson had more than two years from the filing of his case to engage in discovery.

We have considered Johnson's requests that certain documents

and pleadings be incorporated into the record on appeal, and conclude that the material contained in those documents and pleadings does not alter our decision. We dispense with oral argument because the dispositive issues recently have been decided authoritatively, and the facts and legal arguments are adequately presented in the record before us.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-3104

Robert Bowie Johnson, Jr.,

Appellant,

versus

Kalman R. Hettleman, *et al*,

Appellees.

On Petition for Rehearing

ORDER

Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Hall, Judge Murnaghan and Judge Butzner.

For the Court,

JOHN M. GREACEN
CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT BOWIE JOHNSON, JR.
Plaintiff

vs.

KALMAN R. HETTLEMAN, *et al*
Defendant

CASE NO. HAR-83-4097
Baltimore, Maryland
July 11, 1986

TRANSCRIPT OF HEARING
BEFORE HONORABLE JOHN R. HARGROVE

APPEARANCES:

For the Plaintiff:

ROBERT BOWIE JOHNSON, JR.
727 Montalban Drive
Annapolis, Maryland 21401

For the Defendant:

RALPH TYLER
ASSISTANT U.S. ATTORNEY
7 N. Calvert Street
Baltimore, Maryland

HARLAN L. WEISS, ESQUIRE
1200 Chevy Chase Building
Chevy Chase, Maryland 20815

Audio Operator: S.L. Harrison

Transcribed by: Fress State Reporting, Inc.
Annapolis, Maryland

PROCEEDINGS

THE CLERK: This Honorable Court now resumes in session, the Honorable John R. Hargrove presiding.

THE COURT: Good morning.

ALL COUNSEL: Good morning, Your Honor.

THE COURT: All right, I think that before us we have a fair number of motions to be heard. I guess we have to...some Motion for Summary Judgment. There are some motions for discover some discovery disputes. And I think the way...the manner in which I think we ought to deal with that is to hear the summary judgment motions first because I've reviewed the motions...I've reviewed the discovery disputes and many of those, they're merely asking for information which are not relevant to the...some of the issues we're dealing with in the summary judgement first.

I should also indicate that some of you might or might not be aware that the Supreme Court issued two cases within the last week dealing directly with summary judgment which pretty much alter the position for -- of the Fourth Circuit on their views of the summary judgement. And I think I have to be guided by the Supreme Court. So, if you argue motions in their light and in view of the instructions given to us by the Supreme Court in the Sellertex (ph) and the Jack Anderson case, and I'm sure, you might not be aware of it, Mr. Johnson, but in those cases, particularly in the Sellertex case, the Court says in viewing summary judgement, you look at the entire pleadings. You look at all the pleadings, papers and everything else that's been filed in a case and determine whether or not, after viewing them, whether or not the party has established...if they're missing any necessary

PUBLISHER'S NOTE:

The following pages are unavailable for filming: 19-24

MR. McCANTS: If it would please the Court, Leonard McCants on behalf of Dr. Emmett Burns and NAACP. Your Honor, we did not file a, a formal motion or a written motion for summary judgment; however, we are concurring in and ask the Court to, to allow us to adopt the arguments of counsel with respect to the issues involved in this case for purposes of this summary judgment. And we ask at this time that we also be...we also move at this time for summary judgment with respect to Dr. Burns.

THE COURT: Well, I, I think...if it's granted as to anybody or to all, it would certainly affect that. If it was denied, it might or might not. It depends on how you look at it. So, I see no problem with that. I don't think there's any surprises because the evidence is all in as to Dr. Burns. I don't know that there's any, any additional evidence. I think most of it is statements coming through say telephone conversations and some statements coming through news articles about what Dr. Burns is going to do.

All right. Mr. Johnson, you want to respond to the...unto the issue...only to the issue of...on the limitations as to why...whether or not you had knowledge of any porion or any part of this alleged conspiracy prior to November 30, 19...I think in 1980.

MR. JOHNSON: Well, first, sir, the Motion for Summary Judgment filed by Mr. Starnes, Snowden and Hettleman was not received by me until two weeks ago.

THE COURT: Mr. Johnson, I understand that but, but the evidence...there's no additional evidence in this case. The same evidence has been in this case for three years so far. There are depositions. There are...everything has been taken and

supplied to the Court and to you. So, I don't think there are any real surprises, no real surprises that I know of. It's been the same argument that's been gone over for several years. So, I'm not...I understand that but I want you to tell me what evidence in this case or, why you had no knowledge of this...of any incident which you allege in your complaint why you didn't have any knowledge or why after November 30th is a proper date...of 1980...by which you...you know, if you have any knowledge of notice or put on notice of a wrong, you have to file within the three year period under the...under the law. Yes?

MR. JOHNSON: Yes, sir. I...but if I may ask a question about procedure and then get right to that.

THE COURT: Yes, sure.

MR. JOHNSON: I believe you have read the Motion for Summary Judgment.

THE COURT: I've read it. I've read so much. I read everything.

MR. JOHNSON: Okay. Well, I, I have an opportunity to reply to that and I believe it will be only fair that before we continue that this Court would red my response to their Motion for Summary Judgment. You've read what they have to say in writing. I respectfully request that you read what I have to say in writing.

THE COURT: Mr. Johnson, I've read all of your answers and, unfortunately, you have...you have taken the...yes, I'm sorry?

UNIDENTIFIED SPEAKER: --

THE COURT: I understand. I understand but he said he read it and I told him that he could read it but, no, I don't think there...I don't know what, what can be, be added because I think you were fully aware. The Motion to Dismiss in this case had anybody labeled it could have been labeled Motion for Summary Judgment, as well. And I think we dealt with it and the matters stated in the court has been in exhaust...we've exhausted it. And I don't think there's anything new, unless you can tell me what, what you're going to add that's new. Because I told you that...I think that's what I told you. You tell me the...tell me today what...what's new that you're going to add to this except to maybe deny some of the issues that, that were raised.

MR. JOHNSON: All right, sir. Defendant APWA has filed a Motion to Dismiss. Starnes, Snowden, Hettleman...

THE COURT: Motion for Summary Judgment, yes.

MR. JOHNSON: APWA, I believe, has filed a Motion to Dismiss.

THE COURT: All right.

MR. WEISS: I would point out under the Rules that can be treated as a Motion for Summary Judgment and...

THE COURT: I said...

MR. WEISS: ...regardless of the label, Your Honor...

THE COURT: Well, under the...under the Rules you can treat the Motion to Dismiss as a Motion for Summary Judgment if discovery has been had in all of the various things which

that...that's what I'm talk...I'm saying, Mr. Johnson. Full discovery has been had and there can be no more discovery in this case. So, all the facts are -- so that you can tell me what you...what you think that's...

MR. JOHNSON: Sir, I...

THE COURT: ...you have that, that would defeat the Motion for Summary Judgment.

MR. JOHNSON: Well, sir, I must say that, that they have their motions before the Court. All of them now have their motions. I would very much like to have my motion before this Court.

THE COURT: Mr. Johnson, I'm, I'm...to be honest with you, I think we have...this Court has exhausted motions in this case. I think you were filing motions rather rapidly for awhile, and I think pretty much they all relate to the same issues you've answered to everyone else. If you have anything that's new, to tell the Court what you have that's new which would defeat. And it can't be but so much because discovery has been completed, depositions taken. I've read all of those or at least we've been through all of those between the Magistrate and myself, I'm sure. But if you can pinpoint what is new, what you have that is new that will defeat a Motion for Summary Judgment and...

MR. JOHNSON: Yes, sir.

THE COURT: All right.

MR. JOHNSON: Your Honor, I've, I've endeavored to complete my discovery. I've been unable to because it, it...a year ago I was in this courtroom in September and talking about

PUBLISHER'S NOTE:

The following pages are unavailable for filming: 29-44

MR. JOHNSON: Yes, sir.

THE COURT: All right.

MR. JOHNSON: The New York case was distinguishable from this completely in that there was on letter discovered which was sent by Mr. Stanley Bresnoff to thirteen chain store presidents. There was no association considered by the Court with others or anything, just that letter. And based on that letter sitting by itself with no...Mr. Bresnoff said, I've got an idea. Write a letter. I wrote a letter. I, I forgot about it. And the Court said, hey, you can express yourself. So, they, they...but that's not the...that's not what happened here.

THE COURT: Well, let me ask you...you didn't have...you didn't have anymore than...much more than that here. Does it make any difference if he had written ten letters?

MR. JOHNSON: It's not the letter, sir. It's the association with groups which bring economic pressure upon the stores. It's the association in working with those groups. It's the promise...

THE COURT: Well, you lose that because the Courts...

MR. JOHNSON: It's the promise of follow-up.

THE COURT: ...have held that economic boycotts and pressures are, are not...are not in and of themselves in violation of any...as long as it's an economic...as long as you do it legally...as long as you don't use...as long as the state doesn't go to these stores and say, look, if you do not follow...if you do not heed our, our recommendations, we're going to withdraw your licensing or we're going...we're going to make

it tough for you under certain law or we're going to come in and, and, and raid your store and...under the guise...under the laws of obscenity or, or for that type of thing. I think the Supreme Court answers that. They answer that to a -- and even in NAACP versus the Garrison Hardware case up in Mississippi, they clearly answered that one. So, that one is pretty much out of the window, Mr. Johnson. That you can use...you can use all the boycotts you want as long as you...as long as you don't...as long as the state or nobody else in the boycott uses any powers of the state to force someone to do something...

MR. JOHNSON: All right.

THE COURT: ...to, to violate...I don't even know if it goes that far. I think it has to be against your personal right.

MR. JOHNSON: All right, sir. Now...

THE COURT: Which you...I didn't think you claimed that anybody threatened you and made you take your magazines out of...I mean your game out of production, change any wording in your game or stop, stop selling it. As a matter of fact, the evidence disclosed that you sold more games during this time than, than ever; is that correct? That was the peak of your game selling, wasn't it?

MR. JOHNSON: That...there was no ..there's no...

THE COURT: That's what the New York...that's where I understand the deposition in New York showed, that...

MR. JOHNSON: I...

THE COURT: ...that the period we're talking about you sold

more games than you ever sold; right? You, you...

MR. JOHNSON: Well, we sold about a hundredth or what we would have sold but people bought games that they...that they wrote in directly to us and a few stores carried them. It took...the -- plan to ban the game didn't go into complete effect for several months. And then over a period of months it went

into complete operation all over the country. Government officials, NAACP people, under color law, NOW representatives of welfare rights advocates, called up stores. Now, they're state actors, now, we're assuming. They called up stores. They went into stores and they said, if you...and I represent the state...if you carry this game, we're going to picket out there and tell everyone that you carry racist material. And, furthermore, everyone in our organization is going to boycott and we're not going to...

THE COURT: Mr. Johnson, the trouble I'm having is that you use very glib and general language. When you say we, are you talking about groups or are you talking about the state?

MR. JOHNSON: Well...

THE COURT: You see, there's a big difference between...

MR. JOHNSON: Right.

THE COURT: ...between NAACP, the welfare advocates. There's a great difference between them and the state. That doesn't mean that the state...I mean if the NAACP says and does it on its own, -- and assistance from anybody else but develop their own scheme, they say we're going to picket, the Court says, that's fine. That's all right. But you can't say

simply because they make up their own...that suddenly, suddenly this is a state. No, I want you to point out for me...now, Mr. Johnson, I don't want you to get involved in a lot of, of, of beating around the bush. I want you to tell me what action did Mr. Hettleman, Mr. Starnes and Mr. Snowden...particularly those three because they, they all admit that they are state actors...what did they do? That is, what power over the state did they bring forth against anybody, including yourself, or make any effort to do other than persuade someone not to put your, your game on the shelf or not to buy it or try to get people not to buy your game, to go on game shows with you to say that your game is, is a game that depicts people in certain like that doesn't exist which is all they were trying to do and that all the articles, some of them didn't do anymore than write articles. Some said –. Now, I think you're trying to put those all together as a conspiracy...the newsletters saying that, that Mr. Hettleman, Mr. Starnes and Mr. Snowden had responsibility for the newsletter by someone else, to the membership of somebody's organization -- an article about somebody had something to do with, with that. No, I think you're going to have to show me the evidence in this case of any state action which is prohibited.

MR. JOHNSON: I'm having a little confusion, sir, because if we're assuming that everybody is a state actor, when Defendant Snowden or Defendant Burns gets involved with a boycott or threats of picketing or NOW threatens to picket or boycott, then that's a state action.

THE COURT: That's not...Mr. Johnson, I keep on telling you...

MR. JOHNSON: If we're assuming their state

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determination of, of what things should be sold and what should be sold?

THE COURT: Let's read the letter in its proper context. He didn't tell them anything. He said he..he asked them not to. He didn't...that letter doesn't say, you do not...don't put this in there. And it does not say if you do, that we're going to do anything. That letter doesn't say anything that...at least the letter you write to me...doesn't say anything of that nature that I...you are concluding that but I have to read the letter as it's...as it said. It says, we've...I'm not...there's no law which, as I understand you to say, there's no law which says we can keep this game off, off the shelf, but I'm going to try to persuade the retailers to do it. Persuasion is one thing.

MR. JOHNSON: That depends who's doing the persuading.

THE COURT: Forcing them to keep it off by color of state law,by threat, or the license threats and the various other...there's another thing. And that's what I'm asking you to show me in this particular case.

MR. JOHNSON: All right.

THE COURT: Where has Mr. Hettleman or Mr. Starnes or anyone else threatened your game under color...that is, unlawfully. That is...or by threat. You've read this in the New York case in the court and that's a very strong precedent because the cases are almost...not collateral stoppal which I agree with but the cases...we certainly can use that case as a precedent. When we use the case on all four, we call it. You can use that as a precedent. And I think you have to use that New York case as a precedent. I do not believe that at the time when you filed a Motion to Dismiss that you treat it a little different than we are today.

We're the different -- today. As a matter of fact, we got some law from the Supreme Court today which changes, to some extent summary judgment throughout the country.

All right. Tell me what...I keep asking you but you don't...

MR. JOHNSON: All right. Okay.

THE COURT: You keep going around...circle around it.

MR. JOHNSON: All right, sir. Okay. Now, in the Starnes to Hettleman memo which is a summary as of November 24th, of the actions taken by Mr. Starnes, he says, I've had two conversations with Peter Slavin of APWA, who is writing an article for its publication.

Now, Slavin, as a result of those conversations, it appears he and Mr. Weaver developed a nationwide plan to ban the game out of that. He asked Mr. Starnes...

THE COURT: That's...well, again, that's...that might be an erroneous assumption.

MR. JOHNSON: It may be but I've never had an opportunity...

THE COURT: Mr. Johnson, I've read all the...I think if you read...if you look at Mr. Slavin's...and what the parties said in that...and what happened was that, that they furnished Mr. Slavin with background information for his article. There's nothing wrong with a reporter going...that's why Mr. Slavin was let out. There's nothing wrong with him going around from whatever source he can get...he can get your information. That doesn't make you a conspirator simply because you get information. And he has a right to print and publish. And he

certainly didn't send his articles back to Mr. Starnes and to Mr. Hettleman for approval before he published it. I'm sure he didn't.

MR. JOHNSON: Well...

THE COURT: He published it. He might have sent them to his editor but he certainly didn't send it back to anybody. He exercised his right to free speech and to publish and the right to publish. That's all I saw in the case. When you get to the evidence in the case, it's not what you said. He said that I merely talked about the background information. There's nothing wrong with...what's illegal about that?

MR. JOHNSON: Well, there's something very wrong with Mr. Starnes' testimony in that regard because in his testimoy...they withheld this document from me, said they didn't even know if it existed. And then I questioned Mr. Starnes. And he said he only had one conversation with Mr. Peter Slavin. The notes...his own notes say he had two. He said he never talked to Carl Snowden about the game. And, yet, his memo says, I have talked to Carl Snowden and advised him of our interest and efforts. We...

THE COURT: We're more concerned not so much what he did or did not. Assuming that he did, in the light most favorable to you, what did he talk about?

MR. JOHNSON: Well, okay. The memo says we agreed to keep each other advised. Of what? I don't know. I've been unable to question Mr. Starnes on this memo. He lied and said that he did not talk to Mr. Snowden.

I also asked him in interrogatories and in depositions questions, and he did not identify a man named Alan Kapute (ph) who called virtually every store in the Baltimore area as part...in conjunction

with Mr. Starnes.

THE COURT: Yeah, but that doesn't make...that does...you've got to establish that Mr. Kapute...you haven't named him as a party to this conspiracy. -- I guess conspirators, but you haven't alleged and there's no evidence in here that I know of that, that he did anything other than that his name appears in the document. That, that in and of itself...that in and of itself cannot be...cannot be the basis for evidence. I think if you read the Sellertex case, that's pretty much where they had a lot of documents with people's names who allege were going to...even was stronger than this, was going to testify to certain things. And the Court held that...

MR. JOHNSON: But what I'm...

THE COURT: ...they held that the summary judgment should be granted. Okay. -- District of Columbia, as a matter of fact. Yes?

MR. JOHNSON: What I'm suggesting to you...suggesting to you, sir, is that in the...Mr. Starnes...okay. First of all, his attorneys withheld this document from me even though I requested it. So, at the deposition I could not question...

THE COURT: Mr. Johnson, you've had this document long enough and you...and I'm satisfied from all the evidence I've seen in this case that you were...that you knew all of these people. You knew Mr. Snowden back in 1980. So, it's not stranger to you that he might appear in here. You knew a lot of the people. And you knew Mr. Hettleman back in 1982, or so you said. So, I'm not...the fact that you might not have gotten that document until late, that you've had it for sufficient time now. And I don't believe that you're prejudiced in any way by the failure not to have that document.

I think what you have established...having that document or not having that document...look at the document...you, you allege, as I understand in your deposition...you don't allege that this document is defective or you don't allege...yousay this document, as I understand your expression, is one of the documents that you are relying on in your case.

MR. JOHNSON: Uh-huh.

THE COURT: But, now, I assume from that that you're using that document simply because the document exists and names appear, that, therefore, ipso factor (ph) you must have a conspiracy because all these people talked to each other. Conspiracies are not people talking to each other. They're people joining together and doing some things. They have to join together. You have to have some goal in mind but you also have to do something...you have to know that the purpose in the end is something illegal. And if they all join together and told Mr. Hettleman, look, we're going to do it this way. But you go ahead and use the power for the state your way. That possibly could be a conspiracy.

But I want you to show me the evidence...

MR. JOHNSON: All right. Could the state...

THE COURT: That document, incidentally, negates pretty much powers of the state, doesn't it? I mean usually in the state...doesn't it say that we could not use -- can't use...there's nothing under the Consumer Protection? And that's pretty much the same type of thing that happened in South Carolina, where you said we cannot keep the games off of the...I think you can...if you will read everything in that document, he never said under the Consumer Protection Law these, these games are all right.

MR. JOHNSON: Well, we don't know. And I haven't had an opportunity to, to ask Mr. Starnes. I don't know what...

THE COURT: Well, I don't think you have to ask Mr. Starnes that. I think common sense would tell you...the reasonable inference can -- the guy says I looked at the Consumer Protection laws and there's no, no violation there. It just says that they're not going to exercise any state action under that particular...under that particular...in those laws. So, I don't think you need to ask Mr. Starnes anything about that. He said it and it's in writing and it's plain clear English.

MR. JOHNSON: Well, I have very powerful evidence that he committed perjury, Your Honor. He lied about the...

THE COURT: So what?

MR. JOHNSON: What?

THE COURT: People do it all the time, I suppose. Maybe we don't...a lot of people in a lot of cases say a lot of things different from what they said. That's why certain...that's why you have the right to cross examine.

MR. JOHNSON: Exactly, Sir. That's it. I have not had a right to cross examine Mr. Starnes on this memo. And I need that opportunity to cross examine him further.

Look at these notes that Mr. Slavin prepared and all the names whited out. Here are all the conspirators and here are all the actions that they took together but I don't know who they are. And when I began to question APWA and got to a question about, well, who, who are the people that Mr. Slavin talked to? Who are the people that he joined with in this common purpose to

remove the game from the market place? Mr. Weiss objected based on the Maryland Shield law which doesn't apply. So, I couldn't get any information out of APWA. I couldn't get any information...what's the sense in opposing Slavin and weaver if everything I come up to these sources he's going to say Maryland Shield Law?

THE COURT: Well, that's a strategy. That's a trial strategy that you've made and you have to live with it. And if that was your trial strategy, you have the right but you didn't exercise it. You say, what's the use of doing it. You know your case better than anybody else. So, don't...

MR. JOHNSON: Well, I...

THE COURT: ...don't complain now that you didn't exercise your right to do that. But the question is...Mr. Johnson, I don't want to stay all day on this but mine...I've still been trying for the last half hour or more to get you to tell me and I think I have...want you to put on the record in this case...viewing it all and from everybody's...from all of the Defendants in this case, tell me where any Defendant...where any Defendant threatened you, your games. That is, told you if you keep publishing these games, something is going to happen. They're going to exercise some state power to prohibit your game from going to exercise some state power to prohibit your game from going on the market. Or where anybody in the state threatened anybody else. I'm not talking about...you keep harping back to the power of persuasion. I'm not talking about the power of persuasion. New York court said you had the right. The Supreme Court says you have the right by economic...by boycott. You can persuade people not to buy a product. You can persuade people not to go into a store. These are constitutional rights that are protected as much as your right to publish your game and the form in which you publish it in.

Those are equally...those rights are -- of those people and they have a right to exercise those rights. But they do not have a right to exercise those rights, the state or governmental...the government does not if they prohibit you from exercising your right by force, threats, things of that sort.

Now, I think you read the Bannon Book case and you read the Roth case and tell me where you don't come within those cases. I haven't seen any evidence in this case within the parameters of those cases where you really had governmental action, where there were threats or where there were possibly...take books off the shelf or you prosecute somebody under a state law for exercising a First Amendment right. None of that was ever done in your case; am I correct?

MR. JOHNSON: Yes, sir. Yes, it was. Of course, it was.

THE COURT: Now,...excuse me. When you say, of course, it was...Mr. Johnson, you're going -- mental process of assuming everything. Tell me, specifically, where and when?

MR. JOHNSON: All right.

THE COURT: I don't want the...I don't want the generalization. I want where and when. I don't want you to throw a lot of people together and say, this...draw some conclusion from a lot of disjointed facts. I want to have the specific. Who did it, where, and where is it in the evidence in this case, so far?

MR. JOHNSON: All right. The Defendants admit in Mr. Slavin's article that the state NAACP called for a boycott of stores carrying the game and the ensuing flurry of phone calls and letters caused several Annapolis merchants to drop plans to sell it and may have contributed to the same decision by Hecht's a

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MR. JOHNSON: And then you can order me to go on.

THE COURT: All right.

MR. JOHNSON: I find myself...

THE COURT: I'll give you to 12:00. You have five...almost five minutes.

MR. JOHNSON: All right. Sir, I find myself in a real bind here because I've endeavored to gather evidence through the discovery process which will help me to prove my case. I've got these notes here, for example, for Peter Slavin with all the names blocked out. I don't know who these names are. Blank. Some influential people approached store, and they agreed not to sell. I'd like to know who they are. They could...you know, they could have been policeman for all I know. Who knows who they are. There's many other parts of this that are blanketed out, whole sentences, that reveal who. That's what a conspiracy case is about, who. -- October, blank, blank,blank, blank. That could say broken in October. We decided along with Starnes that we were going to stop...and with Hettleman...we were going to stop this game by using threats, the special interest groups, and by putting all these groups under color along...I mean it could not say just about anything. And it's been blacked out, not because Mr...not because Mr. Slavin is a newsman. He's not a newsman at all. He's an advocate for a special interest group. And the Maryland Shield Law is not...

THE COURT: Let me ask you. He was a reporter at the time, though, wasn't he?

MR. JOHNSON: No, sir, he was not. He was an editor of the Washington Report. Now...

THE COURT: Well, that's an...that's an...I assume that that's protected by the...

MR. JOHNSON: No, it's not, sir. I've got the...

THE COURT: Well, what is it, then?

MR. JOHNSON: The Shield Law says...first of...

THE COURT: Well, I'm not worried about the Shield Law. It's some sort of a publication. That's all I'm...I don't worry about the Shield Law. I'm talking about the publication. I'm not here to decide the Shield Law. It was a publication; is that correct?

MR. JOHNSON: Yes, sir. But what I'm saying is, I think...this may be enough alone to carry the jury, if I knew who these names were on these three pages of notes. But they've blocked them out, using the Shield Law as a cover.

Now, it's not...it's not APWA's right to, to claim the Shield Law because the Shield Law says that a person engaged in, connected with, or employed on a newspaper or journal, they've got to do it. APWA is claiming this for Mr. Slavin. Mr. Slavin is not claiming, you know...he left his notes. He doesn't even care about them. He left his notes at APWA. They're blocking out these notes to keep me from gathering evidence, sir. And, further, APWA is not a news organization. Newsletters are not detected at all. Their own documents refer to them...refer to their newsletter as a newsletter. I've got those documents if they want to see it.

Now, Slavin's writing of that article was not, not to give anybody any news. It was an intrical part of a plan to ban the game. And it...here's the plan to ban the game. And the plan to

ban the game says the game is described in the accompanying article and the accompanying article identifies the special interest groups as NOW and NAACP and tells these 1,200 government agencies that are receiving this, well, yes, in Maryland they're taking action. And they're working with the NAACP and NOW to ban the game. You go ahead and do likewise. Okay. So, it's not a news article. So, he has, basically...and if he...first of all, Mr. Slavin doesn't have any right to, to...I mean Mr. Slavin might have a right to hold this back if he were a newsman but he's not. He's not claiming the privilege. APWA is claiming the privilege. So, that's...

THE COURT: Did you...did you take Mr. Slavin's deposition?

MR. JOHNSON: Sir, I took the deposition of the APWA. And every time we got...

THE COURT: No, no, no. I'm asking of Mr. Slavin.

MR. JOHNSON: No, I didn't, sir. The statute of limitations ran out. If you remember, my attorneys with...my attorneys left and went to Detroit for a month...well, almost a month when we had depositions scheduled. That was part of the reason that...

THE COURT: Well, you can't fault the other side for that, can you? Your attorney...

MR. JOHNSON: I can't fault that side buy my attorneys...basically what happened is that they're a young fledgling firm and they got some quick money in Detroit. And my case is on a contingency. And they said, well, we'll cancel all your depositions.

THE COURT: Don't, don't blame the other side. They, they're

not worried...

MR. JOHNSON: I don't blame them, sir.

THE COURT: They weren't...they're not worried about your problems. Your problem is...

MR. JOHNSON: I'm not...

THE COURT: And I would ask you, did you...did you take the deposition of Mr. Slavin and ask him about these various blanks that he...that was in the notes he gave you? You could have done that.

MR. JOHNSON: Sir, I...

THE COURT: You can't blame them. You can't accuse them of withholding information if you make no effort to discover it.

MR. JOHNSON: Sir, I made efforts to discover it. I filed...I filed...

THE COURT: By who...from Mr. Slavin?

MR. JOHNSON: I filed an immediate motion on this...

THE COURT: I read that motion but that's...the way you file your motions, they're not exactly in the...in a way that you can get this type of information. You were...you were asking for all sorts of sanctions and monies and all that.

Now, what I'm asking you...the question is, did you take Mr...you can't compel them to answer something if you don't...if you...if he hasn't refused to answer it. He's never refused to answer it, I understand.

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responsibility to decide whether or not this evidence, as presented, even under the old method, whether or not it, it amounts to sufficient evidence to carry this case forward. But we have been enlightened by the Supreme Court by saying that we can consider it all, not -- affidavits and all that -- each other --who could bring the most affidavits in. We no longer are restrained by, by that. If you bring one -- then automatically you could not grant a summary judgment. The Court said that's no longer the law, the Supreme Court said. And I think for a very good reason. And I think their reason is that the District Courts have the responsibility for -- cases out of those courts by any stretch of the imagination but never get to the jury. And I have to use that standard. Whether or not, after you take all of this evidence, has all the elements of a conspiracy been met even though the old standard, if you haven't met them all you could grant a summary judgment.

A conspiracy of this nature means that all the parties get together with an idea that they're going to do some acts or agree to do certain acts or, or, not all doing the same acts but different acts, to violate a constitutional right of Mr. Johnson. And I think we have been enlightened by many courts that simply doing an act to prevent a game from being sold is not necessarily a violation if that act is a constitutionally protected act of that individuals. We looked at the...I think the NAACP case and Garrison said economic boycott is...is a boycott of a store. A picket is not. So long as those activities occurred on without violating anybody's rights. And there is no evidence in this case that I've seen, and I've been through it all, which indicates that any organization, not one of them, carried out any...attempt to carry out any boycotts or pickets or even intimated that they were going to do any such thing which was not in the same vein and manner and under...protected under the laws of those cases that the Supreme Court has enunciated. I haven't seen any evidence. I think Mr.

Johnson tries to just lump things together but I do not accept that as evidence by just putting all people together and, therefore, if you put all people who disagree with somebody together, you make a conspiracy. That is not the law of conspiracy. You have to establish at least some acts or some acts which has purpose of reaching a goal. And in this case, some illegal goal. That is, to deprive Mr. Johnson of his First Amendment right.

I have found no evidence in this case that NOW, the NAACP, APWA, from this evidence and all the evidence, they're state actors. I think the evidence is abundantly clear that they were individual organizations who had a common interest with a couple state officials who were...who were just very concerned about this particular game because of its content, it was going to do what ever they could legally do to inform people, to notify people and whatever legal action they could do and all the action the boycotts at NAACP were supposed to have, were perfectly legitimate boycotts. I would say that NAACP were probably more experienced at boycotts than Mr. Johnson because they have been through a...through a Supreme Court case dealing with the very issue of boycotts. So, if anybody knew how to conduct a legal boycott, they would. And I think there has been an exercise of a First Amendment right not only by that organization but by many, many, many organizations for many, many years. And I don't...I didn't find any...I believe that what was done was they communicated to find out what are you doing and the evidence -- well, I'll keep in touch with you. And the other side said, well, we're going to write to our membership. And others said we're going to write a newsletter. And then the newspaper man called and said, what information you have about this because I understand you've done some investigation and this information was given. It is not a conspiracy to give information to a newspaper man who's going to write a story unless you conspire with him to write a story and tell him you

want the story to...the story to direct or threaten or to any way prevent...it was not...there's nothing like that in this case. As a matter of fact, the story just reiterates pretty much what each party had intended to do. And it's obvious that they talk a lot of groups. So, Mr. Slavin was not a...was not a, a state actor.

And I find that from the evidence in this case, from looking at it in the light most favorable to the Plaintiff, that the evidence, the pleadings, and everything else in this case, that the NOW, NAACP and APWA, were not...that the evidence does not look at that in the light most favorable...show them to be anymore than individuals exercising a First Amendment constitutional right on behalf of either their organizations or individual members of their organization. So I do not find them to be state actors.

Now, we deal with Mr. Snowden and Mr...and Mr. Hettleman and Mr.Starnes. Mr. Hettleman was in the same position as Mr. Bresnoff. Mr. Starnes was under him. So, you could pretty much consider them to be employer/employee or someone who has the supervision of it. And, and I think if you look at Mr...you have to look at Mr...I'm sorry. Mr. Snowden, he appeared to have been bouncing around from place to place talking to lots of different people. You have to remember he was likewise in a similar position as Mr. Bresnoff because he was on Human Relation Council for, for Anne Arundel County. So, he becomes a state actor because their funding came under the state. But his role was a little different from Mr. Starnes. He was not under the direct supervision of, of Mr. Hettleman, it appears.

In any event, I don't...I think the evidence is abundantly clear that in all of the documents that Mr. Johnson presented, produced, there was not one shred of evidence that anybody was expressing anything but their personal view as to how despicable they thought this game was, how...or either it would affect community

or affect their ability...and this is their personal view...to run the agency.

And I have to...Judge Kauffman case in the Hammerhead case, in ruling in that case, held very strongly that these are First Amendment rights of these individuals and are totally protected by the...and they are protected as much as Mr. Johnson.

In dealing with that case...this is...if you want a case on all fours, that's it. And that Court, without any doubt, in very strong language, says that what Mr. Johnson and his organization was attempting to do in New York would stand the constitution on its head because it would protect him while prohibiting a great many people from exercising their right to expre[illegible] an opposite view. And I think that's all we have in this ca[illegible] I've looked at all the evidence. I found not one iota of evidence in this case that the Government, that is the State of Maryland, threatened, such as in the Bannon Book case...they were going to send in police. There's none of that in this case, only contrary to the evidence was that we do no...such as the South Carolina incident which appears in this case also...that we don't have any legal authority to ban what Mr. Johnson to do. As a matter of fact,they didn't indicate the evidence. And they show that they knew that he...of his rights but that there was some disagreement, that some people were going to do some things. No, I rather...I think what I've done is look at it from the point of view of a Motion for Summary Judgment, taking everything, the most favorable to Mr. Johnson. Even under the old rule, I think he would not prevail because I do not think there...this case could...taking everything, would amount to a case that he could...he would be successful in. But taking the more modern approach and I...and as I said earlier, the Supreme Court, the two recent cases. Considering all this, I do not believe his case could withstand a summary...a Motion for

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THE COURT: I'm not going to...I'm not going to grant it because for a defendant to get it, you would...you're talking about Rule 11. I don't think I'm going to do it. I think in this case...I'll let each side bear its own costs. I think the case has been going on a long time and it's not...

MS. ZEZULIN: That's right, Your Honor. And my client has limited resources and has been put through a lot of trouble and a lot of expense by this particular plaintiff.

THE COURT: Well,that's why...that's exactly why...it's one of the admonitions the Supreme Court said. I'm not making this case anymore expensive for anybody because the evidence in the case does not warrant this case going to trial. And, therefore, I have cut a lot of expense out of the case. And this is what the Supreme Court told us. And I'm not doing it because of that. I'm doing it because they said you look at these cases very hard and, and then you make your determination. And if any element is missing, then you...summary judgment. No, I'm not going...I think...I think you would be creating litigation that you might regret which would cost you three times as much. I never want that to happen.

MR. WEISS: Thank you, Your Honor.

THE COURT: I would...I, I honestly believe that we ought to...this case as far as your organization is finished and to let the...and I'm...I don't know if the appeal is going to be filed but to get involved with something else, and I think maybe other counsel will agree. You might be opening another can of worms. And I'm not interested in that. I think...he had a right to, again, express his view in this case and he didn't succeed. So, I'm not going..I'll let each party bear its own costs. All right.

ALL COUNSEL: Thank you, Your Honor.

THE CLERK: All rise. This Honorable Court now stands in recess.

(Whereupon, the hearing was adjourned.)

CERTIFICATION

I CERTIFY that the foregoing is a correct transcript from the record of proceedings in the above entitled matter.

July 31, 1986 — Christine S. Randolph
Date — Transcriber

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Robert Bowie Johnson, Jr.
Plaintiff

v.

CIVIL ACTION NO.
HAR 83-4097

Kalman Hettleman, *et al*
Defendants

ORDER

After careful consideration and review of all of the motions and memoranda filed in support thereof and in opposition thereto, and after hearing complete argument on said motions at a hearing held on July 11, 1986, the United States District Court for the District of Maryland hereby ORDERS this 11th day of July, 1986, for the reasons stated in open court that:

1. the plaintiff's outstanding Motions to Compel BE and hereby ARE, DENIED;

2. that the defendant NOW's Motion for Summary Judgment BE and hereby IS, GRANTED;

3. that the defendant APWA's Motion to Dismiss BE and hereby IS, GRANTED;

4. that the oral Motion for Summary Judgment for defendant Dr. Emmett Burns made in open court on July 11, 1986, BE and hereby IS, GRANTED;

5. that the defendants Hartleman, Starnes and Snowden's Motion for Summary Judgment BE and hereby IS, GRANTED;

6. that defendant NOW;s Motion for Sanctions made in open court BE and hereby IS, DENIED;

7. that each party shall bear its own costs;
and

8. that the Clerk of the Court mail copies of the Order to all parties in this action.

7/11/86
DATE

John R. Hargrove
United States District Judge